

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,  
THE STATE OF NEW MEXICO, and  
THE NEW MEXICO OFFICE OF  
NATURAL RESOURCES TRUSTEE,

Plaintiffs,

v.

No. \_\_\_\_\_

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY,

Defendant.

**COMPLAINT**

The United States of America, by authority of the Attorney General of the United States, on behalf of the United States Department of the Interior, the United States Fish and Wildlife Service ("DOI"), and the Attorney General of the State of New Mexico, on its own behalf and on behalf of the State of New Mexico ("State") and The New Mexico Office of Natural Resources Trustee ("NMONRT"), file this Complaint and allege as follows:

**STATEMENT OF THE CASE**

1. This is a civil action under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607(a), to recover damages for injury to, destruction of, or loss of natural resources resulting from releases of hazardous substances from the AT&SF, Albuquerque (Tie-treater) Superfund Site, located in Albuquerque, Bernalillo County, New Mexico ("Site").

**JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction over this action pursuant to Section 107 of

CERCLA, 42 U.S.C. § 9607, and 28 U.S.C. §§ 1331 and 1345.

3. This action arises from the transaction of business by Defendant within the State of New Mexico.

4. Venue is proper in this district pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1391(b).

#### PARTIES

5. The United States, through the Department of the Interior (“DOI”), is a Federal Trustee for natural resources injured as a result of releases of hazardous substances from the Site.

6. The State of New Mexico, through the New Mexico Office of the Attorney General and the New Mexico Office of Natural Resources Trustee, is a State Trustee for natural resources injured as a result of releases of hazardous substances from the Site.

7. Defendant The Burlington Northern and Santa Fe Railway Company (“BNSF”) is a Delaware corporation which does business in the State of New Mexico.

8. BNSF is the successor in interest to the Atchison, Topeka and Santa Fe Railway Company (“ATSF”) with respect to ATSF’s liabilities under CERCLA arising from ownership and operation of the Site. Such liabilities of ATSF, became liabilities of BNSF through a merger on or about December 30, 1996. In connection with the merger, ATSF merged with and into the Burlington Northern Railroad Company (“BNRR”) and BNRR changed its name to BNSF.

#### FACTUAL BACKGROUND

9. From 1907 to the present, BNSF and ATSF have owned real property located in Albuquerque, New Mexico and from 1908 through 1972, operated a wood and railroad tie treating facility on the property (“BNSF Property” or “Site”). Among other things BNSF and

ATSF have conducted wood treatment operations using primarily creosote, creosote-petroleum, and zinc chloride mixtures for the manufacture of pressure treated railroad cross ties, lumber, and stack pen and fence posts. Specific areas of environmental impact include the wood treatment area, drip tracks, tie storage area, and wastewater discharge ditch and reservoir, and groundwater beneath the Site.

10. Hazardous substances including polycyclic aromatic hydrocarbons, naphthalene, creosote, benzo(a)fluoranthene, benzo(a)pyrene, and zinc were generated by BNSF's and ATSF's operation of the tie-treating facility and were released at and from the Site to the environment, at and below the surface level.

11. The United States Environmental Protection Agency ("EPA") listed the Site on the CERCLA national priorities list on December 16, 1994.

12. A remedial investigation and two feasibility studies were completed in 2001 pursuant to 40 C.F.R. § 300.430, and, on June 27, 2002, EPA issued a Record of Decision selecting a remedial action to address contamination of the Site.

13. Dismantling of the site was completed by ATSF in 1972. The only remaining structure was the wastewater reservoir/sump, from which sludge and process residue was removed in 1999. Prior surface cleanup activity was conducted in connection with a State of New Mexico enforcement action in 1990.

14. Prior to the release of hazardous substances by BNSF and ATSF, the BNSF Property served as upland habitat for wildlife, including migratory birds and supporting biota, and the ground water resource beneath the Site had not been injured by the substances released.

15. Releases of hazardous substances from the BNSF Property have caused injury to,

destruction of, or loss of natural resources. As a result of the release of hazardous substances from the BNSF Property, upland wildlife habitat it provided and the ground water resource beneath the Site is injured.

16. The DOI/USFWS and NMONRT (collectively "Trustees") undertook an assessment of actions required to restore the natural resources injured, lost, or destroyed at the Site, or to replace the natural resources injured lost or destroyed at the Site by creating and/or enhancing natural resources of comparable value at another location, including an assessment of the costs of such actions.

17. The Trustees have incurred costs in conducting the assessment activities described in Paragraph 16, above.

#### STATUTORY FRAMEWORK

18. Section 107(a) of CERCLA, U.S.C. § 9607(a), provides in pertinent part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- ...
- (4) . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -
- ...

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release . . . .

19. "Facility" is defined in Section 101(9) of CERCLA, 42 U.S.C. 9601, to include:

(A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored,

disposed of, or placed, or otherwise come to be located . . . .

20. "Disposal" is defined in Section 101(29) of CERCLA, 42 U.S.C. § 9601(29), to have the meaning provided in Section 1004(3) of the Solid Waste Disposal Act, 42 U.S.C. § 6903(3), where it is defined as:

[T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

21. "Hazardous substance" is defined in Section 101(14) of CERCLA, 42 U.S.C.

§ 9601(14) to include:

(A) any substance designated pursuant to section 1321(b) (2) (A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to Section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. § 6901 *et seq.* has been suspended by Act of Congress), (D) any toxic pollutant listed under Section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S. C. § 9412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to Section 2606 of Title 15.

22. "Release" is defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), to include: "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ."

#### CLAIM FOR RELIEF

23. Paragraphs 1 - 22, above are realleged and incorporated by reference herein.

24. The Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), and as used in Section 107 of CERCLA, 42 U.S.C. § 9607.

25. Hazardous substances were disposed of at the Site, as defined in Section 101(29) of CERCLA, 42 U.S.C. § 9601(29), and as used in Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

26. There have been releases of hazardous substances from the Site within the meaning of Sections 101(22), 104, and 107(a) of CERCLA, 42 U.S.C. §§ 9601(22), 9604, and 9607(a).

27. As a result of the releases of hazardous substances from the Site, the United States and the State of New Mexico have incurred response costs, as defined in Section 101(23), (24) and (25) of CERCLA, 42 U.S.C. § 9601(23), (24) and (25), and as used in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

28. The release of hazardous substances from the Site has caused injury to, destruction of, and loss of natural resources as defined by Section 101(16) of CERCLA, 42 U.S.C. § 9601(16), which natural resources belong to, are managed by, are held in trust by, appertain to, or are otherwise controlled by the United States and/or the State of New Mexico.

29. BNSF is a “person” within the meaning of Sections 101(21) and 107 of CERCLA, 42 U.S.C. §§ 9601(21) and 9607.

30. BNSF is the current owner and operator of a facility from which there has been a release of hazardous substances within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

31. BNSF is and is also a successor to ATSF, a person who, at the time of disposal of hazardous substances owned and operated a facility from which hazardous substances were disposed of within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

32. Pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), BNSF is

liable to Plaintiffs for damages for injury to, destruction of, and loss of natural resources belonging to, managed by, controlled by, or appertaining to the United States and/or the State of New Mexico, including, without limitation, the cost of assessing such injury or loss resulting from the release of hazardous substances from the Site and the cost of acquiring and/or restoring replacement upland habitat and groundwater resources.

PRAYER FOR RELIEF

WHEREFORE, the United States, the State, and NMONRT request that this Court enter judgment against Defendant BNSF:

(a) Awarding the United States and NMONRT damages for injury to, destruction of, and loss of natural resources resulting from the release of hazardous substances from the Site, including the cost of acquiring and enhancing the equivalent of those injured resources, and the costs of assessing such injury, destruction or loss, in amounts to be proved in this action;

(b) Awarding NMONRT its enforcement costs, including costs of attorney time and costs of this action;

(c) Awarding the United States its costs of this action;

(d) Awarding the United States and NMONRT pre- and post-judgment interest; and

(e) Awarding the United States and NMONRT such other and further relief as the Court may deem just and proper.

FOR PLAINTIFF UNITED STATES:

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